IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

76-1648

No.

KENNETH SHALOM MILLROOD, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DONALD J. GOLDBERG
Attorney for Petitioner

Two Girard Plaza
Philadelphia, Pennsylvania 19102

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4058

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

Kenneth Shalom Millrood, *Petitioner*

v.

Commonwealth of Pennsylvania, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Kenneth Shalom Millrood, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on March 2, 1977.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Lancaster County is unreported and is appended hereto at pp. A-1—A-3. The decision of the Superior Court of Pennsylvania affirming without opinion the judgment of sentence of the Court of Common Pleas of Lancaster County is reported at 233 Pa. Super. 726, 339 A.2d 537 (1975), and is appended hereto at p. A-4. The decision of the Supreme Court of Pennsylvania denying without opinion a Petition for Allowance of Appeal from the Superior Court is unreported and is appended hereto at p. A-5.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Does not the due process clause of the Fourteenth Amendment prohibit a state from requiring a criminal defendant to bear the burden of proof on the issue of registration under a statutory charge of "possession with intent to . . . deliver a controlled substance by a person not registered under this act."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

The Controlled Substance, Drug, Device and Cosmetic Act of the Commonwealth of Pennsylvania [Act of April 14, 1972, P.L. 233, No. 64, §1 et seq., 35 P.S. §780-101 et seq.] which provides in pertinent part:

35 P.S. §780-104: *Schedules of controlled substances*

The following schedules include the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

(1) Schedule I—In determining that a substance comes within this schedule, the secretary shall find: a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision. The following controlled substances are included in this schedule:

* * *

(iv) Marihuana.

35 P.S. §780-106: *Registration*

(a) No person shall operate within this Commonwealth as a manufacturer, distributor or retailer of controlled substances, other drugs and devices nor sell, offer for sale nor solicit the purchase of controlled substances, other drugs and devices nor hold them for sale or resale until such person has registered under this act with the secretary. Such registration must be renewed annually in accordance with rules and regulations relating thereto.

(1) Any manufacturer or distributor not operating an establishment within this Commonwealth, but employing sales representatives or agents within this Commonwealth, shall either register as a manufacturer or distributor as the case may be, or file, in lieu of registration, with the secretary the names and addresses of such representatives and agents, and shall promptly inform the secretary of any changes in said list.

(2) Separate registration with the secretary shall be required annually for each place at which such person carries on activities as a manufacturer, distributor or retailer within this Commonwealth. The certificate evidencing such registration shall be conspicuously displayed and shall not be transferable.

(3) Registrations issued by the secretary or under the law preceding this act to manufacturers, distributors or retailers shall continue to be valid for the period issued and, upon expiration, shall be renewed in the manner provided for renewal of registration issued pursuant to this section. Nothing contained herein shall be construed to require the registration hereunder of any practitioner registered or the appropriate State board, nor to require the separate registration of agents or employes of persons registered pursuant to the provisions of this section, or of sales representatives or agents of manufacturers or distributors not operating an establishment within this Commonwealth whose names and addresses are on file

with the secretary: Provided, however, That all persons registered pursuant to this section, whether located within this Commonwealth or not, shall be deemed to have accepted and shall be subject to all provisions of this act.

(b) No person shall operate as a manufacturer of controlled substances or other drugs unless they are manufactured under the supervision of a registered pharmacist, chemist or other person possessing at least five years' experience in the manufacture of controlled substances, or other drugs or such other person approved by the secretary as qualified by scientific or technical training or experience to perform such duties of supervision as may be necessary to protect the public health and safety.

(c) Each application for registration as a manufacturer, distributor or retailer shall be accompanied by a fee to be set by the secretary. Applications shall be on forms prescribed by the secretary. Registration shall be renewed annually and applications therefor shall be accompanied by the same fee as for initial applications.

(d) Initial registration shall become effective at noon on the sixtieth day after application therefor is filed: Provided, however, That the secretary shall have authority to issue a registration or to issue an order denying such registration pursuant to subsection (e) hereof at any time prior to the expiration of such sixty day period. Renewal of registration shall be effective upon certification by the secretary that the applicant has met all requirements for such renewal.

(e) The secretary may refuse the initial registration and may, after notice and hearing pursuant to the Administrative Agency Law, suspend registration (i) of any person who has made material false representation in the application for registration; (ii) of any manufacturer or distributor who has been convicted of a violation of any law of this Commonwealth or of the United States relating

to controlled substances, if such refusal shall be necessary for the protection of the public health and safety; (iii) of any manufacturer or distributor who knowingly employs in a capacity directly connected with the preparation, handling or sale of controlled substances any person convicted of a violation of the laws of this Commonwealth or of the United States relating to the sale, use or possession of controlled substances, if such refusal shall be necessary for the protection of the public health and safety.

(f) If the secretary takes any action refusing registration or revoking or suspending registration under subsections (e) and (f), the aggrieved party may, within fifteen days after the date upon which a copy of the order is delivered to the address indicated on the application or the registration whichever is applicable, petition the board for review. The board shall, within thirty days, grant a hearing and, as soon thereafter as practicable, adopt, modify or reject the action of the secretary. Any action by the board shall be deemed an adjudication to which the provisions of the Administrative Agency Law, as amended, shall be applicable.

(g) The following persons need not register and may lawfully possess controlled substances under this act:

(1) an agent or employe of any registered manufacturer, distributor, dispenser or any person listed in lieu of registration with the secretary if he is acting in the usual course of his business or employment;

(2) a common or contract carrier or warehouseman, or an employe thereof, whose possession of any controlled substance is in the usual course of business or employment;

(3) an ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a Schedule V substance.

35 P.S. §780-113: *Prohibited acts; penalties*

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

• • •

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

STATEMENT OF THE CASE

This petition raises a fundamental and recurring issue as to the burden of proof under criminal statutes which prohibit certain conduct by persons not registered or licensed by the State. Petitioner, Kenneth Shalom Millrood, was arrested and charged with violation of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act. He was convicted in the Lancaster County Court of Common Pleas of "possession with intent to . . . deliver a controlled substance by a person not registered under this act" [No. 932 of 1973] and sentenced to pay a fine and undergo imprisonment for not less than one nor more than five years. On a companion indictment [No. 931 of 1973] charging conspiracy, he was placed on two years probation to run concurrently with his prison sentence. The controlled substance was marihuana.

At trial there was no evidence to prove that defendant was not registered as required by the statute. Defendant demurred to the evidence and also sought a directed verdict on the ground, among others, that the Commonwealth had not met its burden of proving that he was not registered. The trial judge denied each request. Following conviction, defendant renewed his effort to convince the trial judge that absence of registration was an element of the crime and that Federal and State due process rights required the Commonwealth to affirmatively establish the absence of registration as part of its case. His claim was rejected in a summary opinion in which the trial judge maintained that there were no licenses to possess or distribute marihuana and, if there were, it would be a defense which the defendant would be required to prove. (A-1—A-3). On appeal to the Superior Court of Pennsylvania, defendant again preserved his Federal constitutional claim that he could not be required to bear the burden of proving registration, that the absence of registration is an essential element of the crime, and that the failure of the State to

present any evidence on that issue entitled him to be discharged. On May 15, 1975, the Superior Court of Pennsylvania affirmed the judgment of sentence of the Lancaster County Court of Common Pleas without opinion.

Shortly thereafter, on April 22, 1975, in an unrelated case, the Superior Court of Pennsylvania did reach and decide the issue against petitioner. *Commonweaith v. Stawinsky*, 234 Pa. Super. 308, 339 A.2d 91 (1975). In *Stawinsky* the Superior Court recognized that registration did grant an excuse for conduct otherwise prohibited, but nevertheless concluded that the absence of registration was not a necessary element of the crime. Ignoring the fact that proof of registration would come from the State's own files, the Superior Court reasoned that the Commonwealth should not have to shoulder the "burden of proving an allegation the relevant facts of which were never in its possession."

Defendant also sought to have the Supreme Court of Pennsylvania review the matter, but that Court—after considering his petition for almost two years—refused to entertain an appeal from the Superior Court's decision. In the meanwhile, however, the Supreme Court of Pennsylvania did decide that a conviction for carrying a firearm without a license had to be reversed where the record did not contain any evidence relating to defendant's lack of a license for the weapon. *Commonwealth v. McNeil*, 461 Pa. 709, 337 A.2d 840 (1975).

REASONS FOR GRANTING THE WRIT

Petitioner has been indicted and convicted for violation of a Pennsylvania statute which requires annual registration with the Secretary of Health by those who deal in "controlled substances" and imposes serious criminal penalties upon those who deal in such substances without being registered. 35 P.S. §780-106, 780-113(a)(30). The penal provision here involved describes the prohibited activity as follows:

> "(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, . . ." 35 P.S. §780-113(a)(30).

At the trial level and at every available appellate stage, petitioner has argued that the absence of registration is an essential element of the crime, that he cannot be required to bear the burden of proving registration, and that the failure of the prosecution to present any evidence on that issue entitled him to be discharged. The critical determination is whether absence of registration is in fact an essential element of the crime. If it is, it follows that the Commonwealth had the burden of establishing this element beyond a reasonable doubt. *Commonwealth v. McNeil*, 461 Pa. 709, 337 A.2d 840 (1975). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970).

The trial judge addressed the question in summary fashion and concluded that the absence of registration was not an element of the offense (A-3). On appeal, the Superior Court of Pennsylvania merely affirmed the judgment of sentence without opinion, but that Court did address the question one month later in an unre-

lated case where it held that proving a defendant not to be registered is not a necessary element of the crime. *Commonwealth v. Stawinsky*, 234 Pa. Super. 308, 339 A.2d 91 (1975). One month after *Stawinsky*, however, the Supreme Court of Pennsylvania, in *Commonwealth v. McNeil, supra*, concluded otherwise in an analogous context. In *McNeil* the accused was charged with a violation of the Uniform Firearms Act which provided:

> "No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of residence, without a license therefor as hereinafter provided."

The Supreme Court of Pennsylvania held that absence of a license is an essential element of the crime, that the Commonwealth therefore had the burden of establishing this element beyond a reasonable doubt, and that the defendant's conviction had to be reversed for failure of the Commonwealth to present any evidence relating to defendant's lack of a license for the weapon.

Because of the marked structural similarity between a penal prohibition against carrying a firearm without being licensed and the prohibition here against carrying a controlled substance without being registered, defendant maintains that the holding in *Stawinsky* is no longer valid and that Pennsylvania law makes absence of registration an essential element of the crime which the Commonwealth must affirmatively establish as a part of its case. The Michigan Supreme Court so reasoned in *People v. Rios*, 386 Mich. 172, 191 N.W. 2d 297 (1971), and supported its holding that (1) lack of license was a necessary element of the crime of unlawfully selling narcotics and (2) the burden of proving lack of license fell upon the prosecution, by relying on earlier authorities which held that absence of a license was an essential element of the crime of carrying a firearm without a license. The holding in *People v. Rios* that absence of a license is an essential

element of the crime has now been extended to cases involving possession of narcotics. *People v. Harris*, 43 Mich. App. 531, 204 N.W. 2d 549 (1972); *People v. Gould*, 40 Mich. App. 689, 199 N.W. 2d 573 (1972); *People v. Maceri*, 39 Mich. App. 38, 197 N.W. 2d 89 (1972); *People v. Edwards*, 37 Mich. App. 490, 195 N.W. 2d 35 (1972). *If petitioner has correctly construed Pennsylvania law, it becomes inescapably clear that the burden of proving an essential element of the crime was unconstitutionally shifted to the accused. In re Winship, supra; Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975).

Even if this Court were to determine that *Stawinsky* does represent the last word in Pennsylvania law, this Court is not bound by a state court interpretation of state law when it appears to be an obvious subterfuge to evade consideration of a federal issue. *Mullaney v. Wilbur, supra.* Indeed, one cannot read the *Stawinsky* opinion and not conclude that the Court first determined that it was not practical to require the Commonwealth to prove a negative "the relevant facts of which were never in its possession." With that belief firmly in mind, the Court was faced with the dilemma of declaring the Controlled Substance Act in violation of due process or holding that absence of registration was not a necessary element of the crime. Plainly, the latter was considered more desirable, and the Court so held. The real oddity in the *Stawinsky* opinion is the Court's concern over the Commonwealth's ability to meet the burden of proving absence of registration. The requirement of proving a negative is not unique in our system of criminal jurisprudence, *Mullaney v. Wilbur, supra,* and in this case the absence of registration could be inexpensively and easily proven by official certificate from the registrar—the Secretary of Health of the Commonwealth of Pennsylvania.

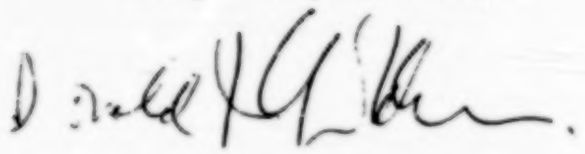
In short, the Pennsylvania legislature has made guilt or innocence depend upon the existence or absence of registration to deal in controlled substances. Having drawn

this distinction, it would unduly denigrate the interests found critical in *Winship* and *Mullaney* if a state court could simply redefine the elements of the crime to meet its determination of where the burden of proof really ought to lie. The intolerable result, of course, is that conviction can be had under *Stawinsky* without there being any record proof at all of the key fact of registration.

CONCLUSION

For the reasons stated above, plenary review by this Court should be granted. However, this Court—if it decides against plenary review—should, at the very least, remand the case to the Supreme Court of Pennsylvania for consideration of this important issue.

Respectfully submitted,



DONALD J. GOLDBERG
Attorney for Petitioner

APPENDIX

IN THE
COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA

Commonwealth of Pennsylvania

v.

Kenneth Shalom Millrood

Criminal Actions
Nos. 931 and 932
of 1973

JOHNSTONE, P. J.

This defendant, and an accomplice, were both charged with possession of marijuana with intent to deliver and conspiracy, and both were found guilty of both charges by a jury. Motions in arrest of judgment and for a new trial were timely filed on behalf of the defendant and these motions are before the court en banc on briefs filed, after argument.

Complaint is made that the court erred in refusing to suppress five large plastic bags of marijuana as evidence because certain provisions of section 780 of the Controlled Substance Act were not complied with. This section of the Act deals only with forfeiture of seized property and does not affect in any way the use or preservation of evidence to be used at trial. It is admitted that the marijuana was seized pursuant to a lawful arrest and whether the evidence was "sealed" or whether process was issued against the evidence affects only the forfeiture of the marijuana and not its use as evidence against the persons charged with a violation of the Act.

The defendant next complains that he was indicted for an offense not alleged in the complaint and that no preliminary hearing was held on the offense charged in the indictment. In our view, it is unthinkable that the defendant or his counsel were not fully aware from the time the complaint was filed that he was being charged

with the possession of marijuana with the intent to deliver the contraband. All the words were not used in the complaint but there is no room for doubt what the charges were against the defendant. We see no substantive defect in the failure of the complaint to state that the defendant possessed marijuana. He knew he had it in his possession and that the State Police seized a large quantity of marijuana from him. The defendant was fully informed at the preliminary hearing of what the charges were against him. This appears to us to be a super technicality which possesses no merit.

The complaint that the defendant was denied the right to call a particular witness is not founded in fact. The witness, Blunt, referred to by the defendant is a State Trooper who was not present at the hearing and who had not been subpoenaed by the defendant. Pa. R. Crim. P. 141 (c) (3) does give the defendant the right to call witnesses at a preliminary hearing but if a witness is not at the hearing and has not been subpoenaed by the defendant, we know of no requirement on the part of the Commonwealth to produce witnesses for the defendant's benefit. The defendant and his counsel knew that the Commonwealth did not intend to call Blunt to make out a prima facie case and if they wanted to call him as a witness, then the responsibility was theirs to see that he was at the hearing and available as a witness.

The District Attorney of Lancaster County, through the County Detective, has for years obtained a very brief thumb nail sketch of prospective jurors called for jury duty during criminal trial weeks. Defense counsel when they saw the District Attorney refer to a list demanded to know what the list was and to examine the list themselves. The defendant's motion was denied and in our view Commonwealth v. Foster, 219 Pa. Superior Ct. 127, supports the court's ruling. Never having seen the District Attorney's investigation we do not know precisely what it contains. Through the years we have learned, however, that a check

is made to determine if any of the prospective jurors have a prior criminal record. We are satisfied that if the defendant had the benefit of the investigation, he would have nothing more than a few questions on voir dire would produce.

The complaint of the defendant that Commonwealth did not present an unbroken chain of custody of the marijuana seized is just not based on fact. The evidence was in the custody of the State Police at all times and there was ample testimony to support that statement.

Finally, complaint is made that the Commonwealth did not prove that the defendant did not have a license or was not registered as a practitioner by the Board. There are, of course, no licenses to possess or distribute marijuana issued by the Board or anyone else. If there were, it would be a defense which the defendant would be required to prove. What the defendant suggests is not an element of the offense charged against the defendant and there is no burden on the Commonwealth to prove a lack of registration.

The defendant may not have had a perfect trial but he had a fair one, and that is all to which he is entitled.

AND NOW, July 30, 1974, the defendant's motions in arrest of judgment and for a new trial are denied and he is directed to appear for sentence at the call of the District Attorney.

BY THE COURT:

/s/

W. G. JOHNSTONE, JR.

A-4

IN THE
SUPERIOR COURT OF PENNSYLVANIA

October Term, 1975 No. 49

COMMONWEALTH OF PENNSYLVANIA

v.

KENNETH SHALOM MILLROOD, *Appellant*

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Lancaster County, at Nos. 931, 932 of 1973.

PER CURIAM: Filed May 15, 1975

Judgment of sentence affirmed.

A-5

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

In re: COMMONWEALTH OF PENNSYLVANIA

v.

KENNETH SHALOM MILLROOD, *Petitioner*

Allocatur Docket

No. 1994

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from the Superior Court, in the above captioned matter:

"March 2, 1977
Denied
Per Curiam."

Very truly yours,

/s/

LAURA E. LITCHARD
Deputy Prothonotary

LEL:mb
CC: D. Richard Eckman, Esq.

In the Supreme Court of the United States

October Term, 1976
No. 76-1648

KENNETH SHALOM MILLROOD,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

D. RICHARD ECKMAN,
District Attorney,
RONALD L. BUCKWALTER,
First Assistant District Attorney,
Attorneys for Respondent

Office of the District Attorney,
Courthouse Annex,
50 North Duke Street,
Lancaster, PA 17602
(717—299-8100)

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1648

Kenneth Shalom Millrood,

Petitioner

v.

Commonwealth of Pennsylvania,

Respondent

COMMONWEALTH'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

QUESTION PRESENTED

Is it not permissible under the Due Process Clause of the 14th Amendment for a defendant to bear the burden of showing that he is registered when the issue of registration is raised under a statutory charge of "possession with intent to . . . deliver a controlled substance by a person not registered under this act"?

REASONS FOR DENYING THE WRIT

The Petitioner, Millrood, was indicted and convicted for "possession with intent to deliver" marijuana in violation of Section 13(a) (30) of The Controlled Substance, Drug, Device & Cosmetic Act of Pennsylvania, 35 P.S. §780-113(a) (30) which prohibits the following acts:

> "(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance by a person not registered under this act . . ."

Marijuana is scheduled by the Act as a "controlled substance". 35 P.S. §780-104. The Act provides for the registration with the Secretary of Health of persons who distribute controlled substances. 35 P.S. §780-104.

The Petitioner's argument, that the absence of registration is an essential element of the crime and as such he cannot be required to bear the burden of proving registration, has been recently addressed and resolved in the case of *Commonwealth v. Stawinsky*, 234 Pa. Superior Ct. 308, 339 A.2d 91 (1975).

In an unanimous opinion the Court held that proof that a defendant is not registered with the Secretary of Health to manufacture, distribute and sell controlled substances is not a necessary element of the crime of violating the Controlled Substance Act and requiring defendant to prove the exception does not unconstitutionally shift the burden of proof to the defendant.

The Court reasoned that since the Act was designed to limit traffic in certain stated substances (marijuana is one such substance) the fact that one can so register and then be able to manufacture, distribute, etc. makes that person exempt from the Act. Since an individual's status of exemption becomes an issue the Court examined Section 21 of the Act (35 P.S. §780-121) which provides:

> "In any prosecution under this Act, it shall not be necessary to negate any of the exemptions of this act in any complaint, information or trial. The burden of proof of such exemption is on the party claiming it."

The Court cited *Commonwealth v. Stoffan*, 228 Pa. Superior Ct. 127, 323 A.2d 318 (1974), a case which interpreted this provision and stated that "the exemptions and exceptions" referred to in Section 21 of the Act must be taken to mean only those which do not state necessary elements of the crime proscribed lest an unconstitutional result obtain.

Judge Spaeth in his concurring opinion after a determination that §13(a) (30) applied to everyone (all persons) stated:

> ". . . The exemption clauses in those sections do not refer to conduct, i.e., to essential elements of the crimes (possession, sale . . .), but to persons who are to be exempted (persons 'registered under this act'). Thus the exemption applies if the accused has attained a certain status; it has nothing to do with the conduct that would constitute a crime if performed by someone else. Status does not constitute an essential element of the crimes. Rather, it only

provides a personal defense. Thus the burden of proving it can be constitutionally shifted to the person claiming it." Pa. at 316-317, A.2d at 94.

The Court in *Stawinsky* stated:

> "Recognizing that the registration provision of the Act does grant an excuse for conduct otherwise prohibited, and recognizing that the Act intends control over certain substances, we hold that proving a defendant not to be registered is not a necessary element of the crime of violating the Act. With this belief, we find that the cases support a conclusion that it is not a violation of due process to place upon a defendant the burden of proving his registration . . . ." Pa. at 312, A.2d at 92.

The Petitioner concedes that the instant case is squarely on point with the *Stawinsky* case, supra, in determining that the absence of registration was not a necessary element of the crime. Petitioner argues, however, that *Commonwealth v. McNeil,* 461 Pa. 709, 337 A.2d 840 (1975), has somehow changed the status of the law on this issue. Petitioner's reliance on *McNeil,* supra, is misplaced. In *McNeil,* the defendant was charged with a violation of the Uniform Firearms Act which provided:

> "No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of residence, without a license therefor as hereinafter provided."

The Court held on this particular set of facts that the absence of a license was an essential element of the crime which the Commonwealth had to prove beyond a reasonable doubt.

The differences in the facts and circumstances between the instant case and *McNeil* are immediately apparent and so great as to render *McNeil* inapplicable.

Under the Uniform Firearms Act there are specific provisions dealing with the licensing of weapons. *Blacks Law Dictionary Revised,* 4th Ed. (1968), defines license as a "certificate or document itself which gives permission" while registration is defined as a "Recording; inserting in an official register; enrollment". It is clear from the plain meaning of the words that to obtain a license and to register are two very different acts as are the consequences. Applying this to the instant case it is clear that when an individual obtains a license as provided by statute he has specific permission to do an act, i.e., possess a firearm (*McNeil* supra) by the mere act of acquiring the license, while to register does not automatically give the individual the right to do an act, i.e., possess a controlled substance, marijuana, unless the individual shows by his status that he falls within one of the exceptions of the Act.

There is no such licensing procedure applicable under the Drug, Device & Cosmetic Act, 35 P.S. 780, for the purchase, sale, manufacture or delivery of marijuana. Petitioner could never obtain a license to purchase, sell, manufacture or deliver marijuana under 35 P.S. 780. He could only register and then only if he was within one of the exceptions could he possess a controlled substance. Here Petitioner did not register, therefore, his status as an individual privileged to distribute a controlled substance was never shown. Since Judge Spaeth points out in *Stawinsky* that status is only a personal defense and not an essential element of the crime, Petitioner had the

burden of showing his registration which he did not do. Since firearms are by their nature so inherently different from narcotics and since licensing and registration requirements are not analogous given their respective meanings, clearly *McNeil* has no effect on the *Stawinsky* decision which was delivered scant weeks before *McNeil*.

McNeil is further inapplicable since the Superior Court of Pennsylvania held in *Commonwealth v. Williams*, 237 Pa. Superior Ct. 91, 346 A.2d 308 (1975), that *McNeil*, supra, would be given prospective application only. In the instant case as in *Commonwealth v. Yaple*, 238 Pa. Superior Ct. 336, 357 A.2d 617 (1976), the Petitioner's case was tried prior to *McNeil* and thus the burden was on the defendant to prove that he had a license if, in fact, he did have one. Since the Petitioner offered no such proof his conviction was proper. See *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967).

It is the Commonwealth's position that *Stawinsky*, supra, is still the law in Pennsylvania and that the absence of registration in a "controlled substance" case is not an essential element of the crime which the Commonwealth must establish as a part of its case.

The Petitioner's reliance on *People v. Rios*, 386 Mich. 172, 191 N.W. 2d 297 (1971), *People v. Harris*, 43 Mich. App. 531, 204 N.W. 2d 549 (1972), and the line of companion Michigan cases is also misplaced.

In *Rios* the lack of a license was held to be a necessary element of the crime of selling narcotics and thus the burden of showing lack of a license fell on the prosecution. Again as in the firearms cases a license was an issue and not registration. It is significant to note that Michigan's statute which was at issue in *Rios* specifically provides: "Any person not having a license . . . who shall sell, manufacture, produce . . . any narcotic drug shall be deemed guilty of a felony" MCLA §335.152 (Stat. Ann. 1957 Rev. §18.1122). Nowhere is registration which is the central issue in the instant case a part of the Michigan statute.

Of particular importance is the fact that Michigan has a specific statute: MCLA §335.53 (Stat. Ann. 1957 Rev. §18.1073), entitled Narcotics, Licenses, which specifically allows the lack of a license to be proved at trial by a statement certified by the Commissioner of the Michigan State Police. Pennsylvania has no such statutory provision. If the Commonwealth was forced to prove the lack of a license in the absence of such a statute as Michigan's it would be a very time consuming and a costly expense on an overburdened administration of justice.

The United States Supreme Court in *Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), stated

> "This Court, however, repeatedly has held that state courts are the ultimate expositions of state law, see, e.g. Murdock v. City of Memphis, 20 Wall 590, 22 L.Ed. 429 (1875); Winters v. New York, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here".

It is clear that the Petitioner has demonstrated no "extreme circumstances" in the instant case. Thus *Stawinsky*, supra, must be considered the final word in Pennsylvania law on this issue of registration.

Petitioner's suggestion that the Commonwealth bear the burden of proving a negative is misplaced. In *Tritt v. United States*, 421 F.2d 928 (10th Circuit 1970), the United States Court of Appeals in affirming a conviction for the sale of narcotics discussed Title 21 U.S.C., §331, §360 which makes it a criminal act for any person whatsoever to sell or deliver drugs unless he is a member of a class of persons excepted under the provisions of §360(a). The Court cited with approval *Walker v. United States*, 176 F.2d 796 (9th Circuit), where the Court stated: "That a statute contains exceptions or exemptions does not mean that they must be negated in the indictment nor need it negate other possible defenses." And in *Nicoli v. Briggs*, 83 F.2d 375 (10th Circuit), the Court said ". . . it has uniformly been held that it is unnecessary for the government to allege or prove that the defendant does not come within a class excepted by the statute. Where there is a general provision defining the elements of an offense, neither the indictment nor the proof need negative exceptions". The Court in *Tritt* concluded that "If in any instance the appellant believed that he came within one or more of the exceptions enumerated in §360(a), it was incumbent on him to say so."

In *United States v. Benish*, 389 F. Supp. 557, affirmed 523 F.2d 1050, certiorari denied 424 U.S. 954 (1975), the United States District Court for the Western District of Pennsylvania upheld defendant's conviction for distributing a controlled substance, "Phendimetrazine". There was no evidence that defendant had obtained or even applied for registration nor was there any evidence that the defendant was entitled to registration. The defendant contended that it was the burden of government to establish their non-entitlement as part of the crime.

The Court discussed 21 U.S.C., §885(a)(1) after which Pa. Section 21 (35 P.S. 780-121) supra was modeled. §885(a)(1) provides as does Section 21, in Pennsylvania, that the government need not negate any statutory exemption or exception in any indictment or at trial but that "the burden of going forward within the evidence of such exemption shall be on the person claiming its benefit." The Court held that this is a purely procedural presumption and stated: "It places on the defendants (who are presumably most familiar with and best able to demonstrate their own qualifications and efforts to obtain registration) to go forward with the evidence." See also *United States v. White*, 463 F.2d 18 (1972), *United States v. Rosenberg*, 515 F.2d 190 (1975).

It is clear from these cases that the burden of proving the negative, exemption or exception is correctly placed on the individual claiming its benefit, in this instance the Petitioner. Clearly there was no hardship on the part of the defendant to prove that he was registered. In fact he would have been acquitted and would surely have admitted evidence if he was so registered. Since the Petitioner offered no proof that he was in fact registered he was properly convicted.

The Commonwealth submits that since *Slawinsky* is the controlling law in Pennsylvania and the Court has determined properly that absence of registration is not an essential element of the crime of violating the Controlled Substance Act the defendant has suffered no due process violation and his conviction must be upheld.

CONCLUSION

For the reasons stated above plenary review by this Court should be denied. Further, since allocatur was properly refused by the Supreme Court of Pennsylvania this case should not be remanded and the judgment and sentence of the lower court should be affirmed.

Respectfully submitted,
D. RICHARD ECKMAN
District Attorney,
RONALD L. BUCKWALTER,
First Assistant District Attorney,
Attorneys for Respondent.